

BOOK REVIEW

Chantal Meloni and Gianni Tognoni,
*Is There A Court For Gaza? A Test Bench
for International Justice* (T.M.C. Asser
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The search for international justice within national systems requires that the international community entrust the making of justice, including the investigation, prosecution and reparation of wrongs, to a national system committed in good faith to endeavour for the achievement of these objectives. The deficiency of the reaction by the mechanisms of international law to Israel's offensive on the Gaza Strip during December 2008 and January 2009 — with its 100:1 Palestinian to Israeli casualty ratio — has left hundreds, if not thousands, of victims without access to justice and without accountability for the perpetrators of the violations to which they were subject.¹ It stands as an illustrative example of the politics of international criminal justice. Chantal Meloni and Gianni Tognoni's monumental compilation of writings by distinguished international law scholars and practitioners endeavours to evaluate the function of international criminal law mechanisms to bring perpetrators to justice and afford an effective remedy for the practice of national systems intended to shield perpetrators from accountability. The volume presents a rigorous and authoritative examination of one of the most critical moments in the recent history of the Palestine Israel conflict, deconstructing the obstacles and defaults in the international reaction that have had the effect of preventing Palestinian victims from gaining access to justice. Its release comes at an opportune moment of burning debate over Palestine's renewed bid for United Nations (UN) membership — as it were, a symbolic gesture of political recognition — which embodies the strategic objective of furthering the status of Palestine within

international institutions — and in particular the International Criminal Court (ICC).

The volume begins, in Part I, by observing the work of the UN Fact Finding Mission on the Gaza Conflict and the follow up thereto, at the international and domestic levels. Richard Falk, the current UN Special Rapporteur on Palestine, discusses the ways geopolitics shaped the reactions to the report's perceived so-called 'liberal legality'. Falk's discussion of the political in the context of the aftermath of the report's release, dovetails with Jennifer Barnette's discussion of the critical reactions to the report, which were 'not so easy to sweep under the rug',² and in fact constituted a 'legitimacy war' against both the report's message and its main messenger, Richard Goldstone, whom Israeli President Shimon Peres labelled 'a small man, devoid of any sense of justice, a technocrat with no real understanding of jurisprudence'.³ The impact of Israel's response to the Goldstone report, which has been characterized elsewhere as the 'politics of deflection',⁴ remains uncertain, and it is an open question whether the report, a 'shining beacon for accountability', has altered the 'geopolitics of impunity'.⁵ As Barnette notes, the precise nature of Israel's violations has yet to be determined by an international judicial body.⁶

Sharon Weill and Daragh Murray's chapters survey the follow-up measures adopted by the Israeli authorities and the deficiencies in Israel's domestic investigation and prosecution system. Weill's analysis demonstrates that a lack of supervision and institutional independence, and a policy of refusal to investigate the higher echelons, characterize Israel's practice. In Weill's view, Israel has made sure that its

1 R. Falk, 'The Goldstone Report and the Goldstone Retreat: Truths Told by Law and Reviled by Geopolitics', in C. Meloni and G. Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (Springer, 2012) 83, at 88.

2 J. Barnette, 'Initial Reactions to the Goldstone Report and Reflections on Israeli Accountability', in Meloni and Tognoni, *ibid.*, 123, at 130.

3 Shimon Peres, in meeting with Brazilian President de Silva, in *ibid.*, at 137.

4 T. Segev, 'Israel and Palestine: Eternal Enmity', *New York Review of Books*, 14 January 2010, at 47–48, cited in Falk, *supra* note 1, at 96–97.

5 Barnette, *supra* note 2, at 140.

6 *Ibid.*, at 139–140.

'investigations' are kept 'private' and resolved in a 'friendly sphere'.⁷ Murray analyses the findings of the UN Experts Committees, established to examine the compliance of Israel's follow-up investigations with international standards — the investigation of investigations. Murray also recalls the Committees' observations regarding the Palestinian investigations, which were partly adequate, partly deficient in their thoroughness and effectiveness.⁸ Such analysis is key, since domestic war crimes investigations determine the propriety of the function of international criminal justice, which rests on the primacy of national systems, as proscribed by the international criminal law principle of complementarity between national and international mechanisms.⁹

To recapitulate this stratum of the volume, Liesbeth Zegveld's discussion of the role of fact-finding in seeking accountability for violations of international humanitarian law emphasizes that ensuring the prompt, thorough, independent and impartial collection of 'the "facts" of a case' is crucial for the implementation of accountability.¹⁰ International fact-finding missions have the crucial task of promptly gathering evidence before domestic foot dragging results in its disappearance, and Zegveld acknowledges that 'states are more amendable' to fact-finding missions that are 'felt to be less intrusive and hence less prejudicial to their sovereign prerogatives'.¹¹

The volume asks its titular question most pointedly in the contributions that discuss

- 7 S. Weill, 'The Follow up to the Goldstone Report and its Legal Impact in Israel and Beyond', in Meloni and Tognoni (eds), *supra* note 1, 105, at 114.
- 8 D. Murray, 'Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring the "Goldstone Process"', in Meloni and Tognoni (eds), *supra* note 1, 145, at 158–159.
- 9 See, for a more detailed discussion of Israel's practice under the standard of the principle of complementarity, V. Azarov and S. Weill, 'Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice', 12 *International Criminal Law Review* (2012) 905.
- 10 L. Zegveld, 'The Importance of Fact-Finding Missions Under International Humanitarian Law', in Meloni and Tognoni (eds), *supra* note 1, 161, at 162.
- 11 *Ibid.*, at 162.

Palestine's declaration to the ICC under Article 12(3) of the Rome Statute, which resulted in the prosecutor's initiation of an inherently misconstrued debate about Palestine's statehood status under general international law.

In the foreword, William Schabas writes: "This volume asks: "Is There a Court for Gaza?" The answer is a resounding yes. Indeed, there are at least two courts capable of addressing the armed conflict in Gaza that took place in December 2008 and January 2009: the International Court of Justice and the International Criminal Court. But neither of them has jurisdiction *prima facie*. The challenge, then, is to resolve the difficulties in establishing jurisdiction."¹²

The former ICC prosecutor failed to do so. In response to the Palestinian declaration, Luis Moreno Ocampo proceeded to mull over the question of Palestine's status as a state in international law for more than three years. The prosecutor's so-called 'update' on the 'Situation in Palestine', issued on 3 April 2012, was similarly fixated on the question of Palestine's status as a state, a quandary which it deferred to the UN bodies and the ICC's Assembly of State Parties. Yet, since statehood status in international law is a political matter, subject to bilateral state to state determinations, the prosecutor's move served merely to feed the political forces seeking to derail the application of international law as intended and widely accepted in such cases. The fact that the prosecutor's office did not have a procedure or past practice to follow with regards to the resolution of these questions did not mean that he had no option but to defer the matter, meanwhile removing Palestine from its case docket. In fact, the update failed to consider decisive facts concerning Palestine's engagement with international law, including UN practice vis-à-vis Palestine's admission as a member of UNESCO and Palestine's ratification of several of its treaties.¹³

Additional avenues are suggested by Alain Pellet. Examining the validity of Palestine's declaration, Pellet's expert brief, signed by a

- 12 W. Schabas, 'Foreword', in Meloni and Tognoni (eds), *supra* note 1, v, at iv.
- 13 UNESCO page on Palestine, available online at <http://www.unesco.org/new/en/unesco/worldwide/arab-states/Palestine/> (visited 25 January 2013).

list of acclaimed international law experts, adopts a functional, teleological approach to the interpretation of the Rome Statute, the object and purpose of which is to ensure universal access to justice. If the Court were to refuse the declaration, Palestine would be placed in an international criminal law vacuum. The opinion argues that the declaration fulfills the Statute's conditions for jurisdiction. It states that in accepting the declaration, the Court does not need to pronounce itself on the question of Palestine's statehood status.¹⁴ The brief is complemented by Vera Gowlland-Debbas' remarks supporting the functional interpretation approach while concurrently reaffirming Palestine's status as a state under international law.¹⁵

John Quigley's paper complements this analysis by substantiating Palestine's long accepted treatment as a state, based on, *inter alia*, its entitlement to self-determination, recognition by other states and regard by international organizations.¹⁶ Robert Weston Ash seeks to rebut Quigley's claims, relying on political statements by Palestinian officials that indicate that the establishment of a Palestinian state remains a future event.¹⁷ Quigley's rejoinder convincingly distinguishes between *actual* and *formal* statehood.¹⁸ Yaël Ronen's contribution remarks that in deliberating on the declaration, the ICC would have to pronounce itself on issues of sovereignty. Yuval Shany adds that the PLO-Israel Interim Agreements prevent the Palestinian National Authority from transferring

jurisdiction over Israelis, which it does not possess in the first place, to an international mechanism.¹⁹

Schabas notes in the foreword to this work that the consequence of a claim that insulates Palestine from the ICC 'leads to an absurdity, or at least to a proposition that defies the very object and purpose of the Rome Statute' — 'to put an end to impunity'.²⁰ John Dugard affirms in his concluding remarks, '[i]t would take a brave, independent and courageous Prosecutor to take action against Israel.'²¹ Whatever the criticisms against the UN Fact-Finding Mission's report, at the minimum, its contribution should be appreciated in the context of 'a serious attempt to secure the accountability of a state that has for too long been allowed by the West to behave in a lawless manner'.²²

Michael Kearney's paper puts such lawlessness in historical context, recalling Palestine's relegation to the periphery of international law by the 1947 UN Partition Plan, which was issued in disregard of well-acknowledged Palestinian claims to rights in international law. Civil society and international actors continue to cede key 'overarching questions' of international law, including Palestine's statehood, prolonged occupation and settlement by Israel, to politics.²³ Despite political currents, Palestine's present day status 'need[s] to be considered in the context of undeniable increase in the "legalization" of the diplomatic, cultural, political and military aspects of the conflict', in which debates about statehood, colonialism and self-determination were re-awakened in a context of growing Palestinian

14 A. Pellet, 'The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction', in Meloni and Tognoni (eds), *supra* note 1, 409, at 424–425.

15 V. Gowlland-Debbas, 'Note on the Legal Effects of Palestine's Declaration Under Article 12(3) of the ICC Statute', in Meloni and Tognoni (eds), *supra* note 1, 513, at 514–524.

16 J. Quigley, 'Palestine Statehood: A Rejoinder to Professor Robert Weston Ash', in Meloni and Tognoni (eds), *supra* note 1, 416, at 432–438.

17 R.W. Ash, 'Is Palestine a "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue"', in Meloni and Tognoni (eds), *supra* note 1, 441, at 443–449.

18 Quigley, *supra* note 16, at 462–464.

19 Y. Shany, 'In Defence of Functional Interpretation of Article 12(3): A Response to Yael Ronen', in Meloni and Tognoni (eds), *supra* note 1, 497, at 498. Originally printed in this *Journal*, at 8 (2010) 329–343.

20 Schabas, *supra* note 12 at vii.

21 J. Dugard, 'International (In)Justice and Palestine', in Meloni and Tognoni (eds), *supra* note 1, 581, at 584.

22 *Ibid.*, at 585.

23 M.G. Kearney, 'Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law', in Meloni and Tognoni (eds), *supra* note 1, 391, at 394.

activism through international law.²⁴ It was not until Palestine's ICC declaration, submitted in January 2009, that the question of Palestinian statehood was raised for a fully fledged discussion by the international community.²⁵ What in some circles used to be characterized as the pseudo legal system, referred to as international law, is now denigrated by those circles as the battleground for illegitimate so-called 'lawfare'.

Notwithstanding such pressures undermining the proper application of international law, Meloni and Tognoni indicate that global civil society and third states concerned with the promotion of international law, and respect for their domestic legal orders which incorporate it, could effect change in Israel's behaviour. Initiatives that have sought to devise new legal arguments to facilitate claims against Israel's accomplices are showcased in the work of the Russell Tribunal on Palestine, which brought to light important facts about the incongruence between the activities of

international actors that recognize Israel's unlawful conduct and their purported foreign interests and legal obligations.

As a work that contributes both archival documentation and important analysis, this volume documents the diversity of initiatives for justice in the Palestinian Israeli context and their defeats. Nearly four years after Israel's offensive, this important chronicle provides a solemn narrative of the UN Fact-Finding Mission's work and Palestine's turn to the ICC at the crossroads between the politics of international justice and the interests of states to ensure respect for international law by combating impunity and achieving justice for Gaza's victims.

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²⁴ *Ibid.*, at 393.

²⁵ *Ibid.*, at 401.